No. 01-377

In the Supreme Court of the United States

DAVID K. WILSON, PETITIONER

v.

ATLAS WIRELINE SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, a court must deem an individual's disability "permanent" at the earliest date a doctor rates an individual's disability as permanent, regardless of other medical evidence in the record from the same doctor.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is unreported. The decisions and orders of the Benefits Review Board (Pet. App. 12-25) and the administrative law judge are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 2001. The petition for a writ of certiorari was filed on August 15, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Longshore and Harbor Workers' Compensation Act (LHWCA or Act) generally defines "disability" as

"incapacity because of injury to earn the wages which the employee was receiving at the time of injury." 33 U.S.C. 902(10).[1] In determining eligibility for benefits under the Act, disabilities are classified as either total or partial, and as either permanent or temporary. 33 U.S.C. 908(a), (b), (c) and (e). Compensation for all total disability cases is computed using the same formula (two-thirds of the employee's average weekly wage), but only individuals with permanent total disabilities receive an annual cost of living adjustment. 33 U.S.C. 908(a) and (b), 910(f).

The test for whether a disability is permanent or temporary is whether the "condition has continued for a lengthy period, and it appears to be of lasting or indefinite duration, as distinguished from one which merely awaits a normal healing period." *E.g.*, *Watson* v. *Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968), cert. denied, 394 U.S. 976 (1969). An alternate formulation of that test is whether the claimant has reached "maximum medical improvement" or "MMI." *E.g.*, *Bunge Corp.* v. *Carlisle*, 227 F.3d 934, 940 (7th Cir. 2000) ("Maximum medical improvement is attained when the injury has healed to the full extent possible.").

1. On December 27, 1988, petitioner injured his lower back while working for Atlas Wireline Services as a field engineer on an offshore oil rig. Pet. App. 14; ALJ Dec. 3, 4. On February 6, 1989, petitioner had lumbar disk surgery, which was performed by Dr. Michael

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[1] The Act also provides compensation, without proof of diminished wage-earning capacity, for certain post-retirement occupational diseases, 33 U.S.C. 902(10), 910(d)(2), and for "scheduled injuries" specifically listed in 33 U.S.C. 908(c)(1)-(20) and (22). See *Bath Iron Works Corp.* v. *Director, OWCP*, 506 U.S. 153, 155-156 (1993).

Lowry. Pet. App. 14. On January 22, 1990, petitioner tried to return to work as an auto parts service writer, which required him to answer the phone and to order needed parts. Pet. App. 14; ALJ Dec. 3-4. On June 16, 1990, however, he resigned because of back pain, and he has not worked since that time. Pet. App. 14.

On June 10, 1996, petitioner was surgically implanted with a spinal cord stimulator, but the device was removed one week later because it was ineffective. Pet. App. 14. On October 10, 1996, petitioner was surgically implanted with a morphine pump. *Ibid.* In late 1997, petitioner was referred to a psychological counselor, who diagnosed him as suffering from depression and post-traumatic stress. *Ibid.* Petitioner was also evaluated by two psychiatrists, who confirmed that petitioner suffered from severe depression that impaired his ability to work. ALJ Dec. 18-20.

2. This litigation began on October 14, 1997, when Atlas Wireline Services filed a Notice of Controversion regarding petitioner's entitlement to disability benefits. The case was later scheduled for hearing before an administrative law judge (ALJ). Petitioner's evidence included a medical report from Dr. Lowry, dated December 19, 1989, stating: "The patient is now 10 months after surgery. * * * At this time I think that the patient has reached MMI and I would place his disability at about 15%." Petitioner's Record Excerpt 5(B) at 1. The record also contained a deposition from Dr. Lowry, taken on June 1, 1998, which described petitioner's back condition after the morphine pump surgery:

> Q: Do you have an opinion as to whether Mr. Wilson has reached Maximum Medical Improvement from a neurosurgical standpoint?

> A: * * * [H]e is probably at or near MMI as far as anything I know to do for him, you know, to try to control his pain.
>
> * * * * *
>
> Q: I'm looking at your *May 19, 1997* report. Is that the date that you would assign [Wilson] his MMI?
>
> A: Yes, because that's a good follow-up period * * * and he'd had some minor adjustments to the device during that period and was fairly stable right then."

Respondent's Record Excerpt J at 29, 31 (emphasis added).

On January 8, 1999, the ALJ awarded petitioner *temporary* total disability benefits from December 28, 1988 until January 22, 1990, and from June 16, 1990 until the present. Gov't C.A. Br. 3-4. Notwithstanding that determination, however, another part of the ALJ's opinion described petitioner as "*[p]ermanently* disabled, thus entitling him to [p]ermanent [t]otal disability compensation benefits from [M]ay 19, 1997 to present and continuing thereafter." Pet. App. 8 (quoting ALJ Dec. 36) (emphasis added).

The ALJ's opinion was similarly unclear as to the basis of petitioner's disability; some parts of the opinion based a finding of disability on petitioner's physical impairments alone, while other parts seemed to rely on petitioner's physical impairments in combination with his psychological limitations. Pet. App. 4-9. The ALJ credited Dr. Lowry's opinion that petitioner's back condition had reached maximum medical improvement on May 19, 1997 and also credited the opinions of a counselor and two psychiatrists, who opined that peti-

tioner's psychological condition had not reached maximum medical improvement. *Id.* at 6-7. On February 18, 1999, the ALJ denied, in pertinent part, petitioner's motion for reconsideration.

On March 10, 2000, the Benefits Review Board affirmed the ALJ's decision. Pet. App. 12-25. The Board found that the ALJ had acted reasonably in accepting Dr. Lowry's opinion that petitioner's back condition had reached maximum medical improvement in May 1997, despite other evidence from Dr. Lowry indicating that petitioner's injuries had reached maximum medical improvement in late 1989. *Id.* at 18-19. The Board also affirmed the ALJ's finding that petitioner was temporarily totally disabled by his psychological condition, which still had not reached maximum medical improvement. *Id.* at 19. The Board did not discuss the possible relationship between petitioner's physical and psychological injuries as causes of his disability.

On June 1, 2001, the United States Court of Appeals for the Fifth Circuit issued an unpublished opinion remanding the case for clarification, because the court was "unable to determine what the ALJ held on the issue of whether Wilson was entitled to temporary or permanent total disability." Pet. App. 4. The court of appeals characterized its concern as follows:

> On the one hand, the ALJ appears to find that Wilson's physical and mental impairments, in combination, render him totally disabled, and that since the mental impairments had not reached MMI, Wilson was only entitled to temporary [total] disability.

* * * * *

> On the other hand, the ALJ's decision might be read to find, as a factual matter, that the physical back injury alone rendered Wilson [p]ermanently [t]otally disabled.

Pet. App. 4, 7; see also *id.* at 4-5 (noting that "[i]f the ALJ believed that the physical back injury alone rendered Wilson permanently totally disabled, there would have been no reason for the ALJ's lengthy discussion of Wilson's mental impairments").

The Fifth Circuit concluded that, if the ALJ found Wilson permanently and totally disabled because of his back injury alone, the ALJ erred in awarding only temporary total disability benefits. Pet. App. 9. The court further concluded that, if "the ALJ found that Wilson's physical back injury and psychological impairments, only *in combination*, rendered him totally disabled, and that the psychological impairments were temporary, then the ALJ did not legally err." *Ibid.*

The court of appeals also held that substantial evidence supported the ALJ's finding that petitioner's back injury reached MMI in 1997 rather than 1989, thereby rejecting the argument of petitioner and of the Director of the Office of Workers' Compensation Programs (OWCP) that petitioner's permanent total disability began in 1989. Pet. App. 10-11. The court recognized, however, that the legal significance of that finding would necessarily depend on whether the ALJ determined, on remand, that petitioner was totally disabled by his back injury alone. *Id.* at 10.

ARGUMENT

The court of appeals' unpublished decision, remanding this case to the ALJ for clarification, does not conflict with any decision of this Court or of any court of appeals. The court of appeals correctly articulated

longstanding principles for determining when a disability becomes permanent. Although the Director of OWCP believes that the court and the ALJ misapplied those principles to the facts of this case, such errors do not warrant review by this Court and, in any event, may be corrected on remand by asking the ALJ to modify his award. 33 U.S.C. 922. Accordingly, review by this Court is not warranted.

1. Petitioner's primary contention concerns the date his total disability became permanent. Although the Act does not expressly define the term "permanent total disability," the courts of appeals that have considered the issue have achieved broad consensus: "[A]n employee [is] permanently disabled when his condition has continued for a lengthy period, and it appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period." *Watson*, 400 F.2d at 654.[2]

The test for permanency has also been articulated by reference to the claimant's "maximum medical improvement" or "MMI." *E.g.*, *Louisiana Ins. Guar. Ass'n* v. *Abbott*, 40 F.3d 122, 126 (5th Cir. 1994). "Maximum medical improvement is attained when the injury has healed to the full extent possible." *Bunge Corp.* v. *Carlisle*, 227 F.3d 934, 940 (7th Cir. 2000).[3] The point at which a claimant reaches MMI is largely a question of

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[2] Accord *Stevens* v. *Director, OWCP*, 909 F.2d 1256, 1258-1259 (9th Cir. 1990), cert. denied, 498 U.S. 1073 (1991); *Crum* v. *General Adjustment Bureau*, 738 F.2d 474, 480 (D.C. Cir. 1984); *Air America, Inc.* v. *Director, OWCP*, 597 F.2d 773, 781 (1st Cir. 1979); *Newport News Shipbuilding & Dry Dock Co.* v. *Director, OWCP*, 592 F.2d 762, 764 (4th Cir. 1979).

[3] Accord *Palombo* v. *Director, OWCP*, 937 F.2d 70, 76 (2d Cir. 1991); *Stevens*, 909 F.2d at 1257.

fact informed by medical evidence, *ibid.*, and the purposes of the Act.

In this case, the court of appeals applied both the *Watson* and the MMI tests for permanent total disability. Pet. App. 2-3. Its unpublished opinion primarily addressed the ALJ's inconsistent application of those tests to the record. The ALJ found that the record included evidence of separate physical and psychological disabilities, with potentially different MMI dates, either or both of which could be deemed totally disabling. *Id.* at 4-10. Petitioner has not demonstrated that any part of the Fifth Circuit's decision creates a conflict among the circuits on any question of law, nor can he show that the Fifth Circuit's unpublished opinion will affect the result in any other case under the Act.

Insofar as petitioner simply seeks reversal of the ALJ's finding that his back condition reached MMI in 1997, that intrinsically fact-bound issue does not warrant this Court's review, especially since petitioner may yet obtain relief on remand by asking the ALJ to modify his decision due to a "mistake in a determination of fact." 33 U.S.C. 922; see *O'Keeffe* v. *Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971) (noting that the Act grants factfinders "broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted").[4]

2. Petitioner also proposes a legal rule for identifying permanent disabilities under the LHWCA, urging this Court to hold that "'permanency' is established at

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[4] Although the court of appeals did not reverse the ALJ's finding on that point, nothing in the court of appeals' opinion would bar the ALJ from reconsidering the issue.

the earliest date a doctor rates a claimant's condition and to stop relying on the term 'Maximum Medical Improvement' to indicate the beginning of permanency." Pet. 11. Petitioner offers two arguments to support his rule, which contradicts several court of appeals decisions. *E.g.*, *Bunge Corp.*, 227 F.3d at 939-940. First, petitioner cites (Pet. 9) the definition of "disability" contained in 33 U.S.C. 902(10). That reliance is misplaced. Section 902(10) states:

> "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment; but such term shall mean permanent impairment, determined (to the extent covered thereby) under the guides to the evaluation of permanent impairment promulgated and modified from time to time by the American Medical Association, *in the case of an individual whose claim is described in section 910(d)(2) of this title.*

33 U.S.C. 902(10) (emphasis added). The only reference to the American Medical Association's guidelines concerns claims brought under 33 U.S.C. 910(d)(2), which governs only cases of post-retirement "occupational disease." See *Bath Iron Works Corp.* v. *Director, OWCP*, 506 U.S. 153, 154-158 & n.4 (1993) (explaining the specific purpose served by that part of Section 902(10)). In this case, petitioner suffered a traumatic injury with immediate consequences before his retirement; thus, the quoted statutory text simply does not apply.

Second, petitioner cites (Pet. 5-6) several Benefits Review Board cases for the proposition that "the earliest date that a doctor asses[ses] a claimant with a disability rating will determine the onset of perma-

nency." *Id.* at 6. None of those cases, however, draws petitioner's distinction between a doctor's assignment of a permanent impairment rating and the well-accepted term "MMI." On the contrary, doctors—including Dr. Lowry in this case—often consider MMI quite important to their assignment of permanent impairment ratings.

Moreover, to the extent that the cited decisions analyze what constitutes "permanency," they hold only that "the date that a physician assesses claimant with a disability rating will suffice to determine the date of permanency." *Sketoe* v. *Dolphin Titan Int'l.*, 28 Ben. Rev. Bd. Serv. (MB) 212, 222 (1994).[5] They do not address circumstances in which the same doctor determines that a patient's disability reached MMI on two different dates. As discussed above, the issue in this case poses a pure question of fact, namely, how to interpret apparently contradictory evidence. Such an issue is not resolvable by reference to medical guidelines, and its resolution would not be significantly aided by discarding the established term "Maximum Medical Improvement."

Finally, even if the merits of petitioner's legal claims were more substantial, this case presents a poor vehicle for addressing them. The proceedings on remand to the ALJ have not been completed. Until the ALJ

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[5] Accord *Jones* v. *Genco, Inc.*, No. 84-2066, 1988 WL 232732, at *3 (Ben. Rev. Bd. Jan. 27, 1988); *McKnight* v. *Carolina Shipping Co.*, No. 97-618, 1998 WL 461479, at *7 (Ben. Rev. Bd. July 10, 1998); see also *Divita* v. *Thames Valley Steel Corp.*, No. 96-0810, slip op. 2 (Ben. Rev. Bd. Jan. 22, 1997) ("the date of permanency may be established by either the date on which a claimant's condition reaches maximum medical improvement or the date on which a physician assesses a claimant with a disability rating"), *available at* <http://www.dol.gov/dol/brb/public/96-0810.htm>.

determines the medical basis for petitioner's disability, petitioner cannot show that any decision by this Court would affect the result in his case. If, for example, the ALJ found that petitioner's back injury alone did not cause him permanent total disability, that finding (itself appealable) would render irrelevant any resolution of current disputes concerning the date his back injury reached MMI. Though petitioner argues that the result in his case is factually incorrect, there are other venues for correcting any remaining errors, and petitioner has not shown any ripe and important legal question warranting this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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